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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001135-MR
&
NO. 2006-CA-001140-MR

JAMES MICHAEL HAMILTON — APPELLANT

v.

APPEALS FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
INDICTMENT NOS. 05-CR-00280 AND 05-CR-00156

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, LAMBERT, AND STUMBO, JUDGES.

LAMBERT, JUDGE: James Michael Hamilton appeals from a denial of his Motion to Suppress Evidence. For the reasons set forth herein, we affirm the judgment of the Pike Circuit Court.

On January 11, 2005, Kentucky Vehicle Enforcement Officer, Keith Justice, made a traffic stop of Ryan Sloan. Sloan appeared nervous and when asked about a bulge in his pocket produced $2,000.00 in cash. Sloan first represented that he was going to use the money to buy a car. He also stated he was going to Hamilton's residence. Approximately thirty-sixty minutes later, Sloan was stopped again, and the cash was gone. When pressed, Sloan indicated that he had paid Hamilton for a car but could not tell the officers what type of car he had purchased.

This questionable response, coupled with Officer Justice's general information in the community that Hamilton may be involved in drug trafficking, aroused Justice's suspicions. Hamilton was called thereafter and denied any knowledge or information about a car deal involving Sloan. A short time later, Justice and several other local law enforcement officers arrived at Hamilton's residence for a "knock and talk."

According to Officer Justice's testimony at the suppression hearing on March 7, 2006, Hamilton answered the door when they knocked.[1] As he stood in the doorway, Justice saw a female run through the house. When he inquired about the female, Hamilton volunteered that he thought there may be an outstanding arrest warrant on the female and that she might be heading out the back door. Not knowing whether there were any outstanding warrants on the female, not knowing if there were any other individuals in the house, and in concern for his safety and the safety of his fellow officers, Justice entered the house and went into the bedroom in the direction the female had been running.

[1]There was a sworn affidavit of another officer that stated Beverly Hamilton answered the door. However, the discrepancy in events ends there.

Hearing noise emanating from the closet, Justice opened the closet door and found Hamilton's live-in girlfriend, Beverly Bartley Hamilton. Justice advised Beverly of her Miranda rights, at which point she made it clear she wished to cooperate with the police and that she would show them where the money and drugs were kept. The search revealed oxycontin, xanax, cocaine, approximately $12,000.00 in cash, and a gun hidden in the living room couch. Both parties were arrested and charges filed.

At the suppression hearing on March 7, 2006, Hamilton argued that the police had no probable cause to enter or conduct a warrantless search. The court recognized exceptions to warrantless searches as set out in case law and the concept of third-party consent to search. The trial judge concluded that Beverly's consent and cooperation in the search were voluntary and the motion to suppress was overruled.

Hamilton entered a conditional guilty plea and received a ten-year sentence. He was allowed to post an appeal bond. This appeal followed.

Hamilton's only argument is that the trial court erred in overruling his motion to suppress. We disagree.

The trial judge's findings of fact on a motion to suppress evidence will only be overturned if clearly erroneous. *See, e.g., Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); *Roark v. Commonwealth*, 90 S.W.3d 24, 28 (Ky. 2002). Furthermore, under RCr 9.78, as long as the trial court's determination on a suppression issue is supported by substantial evidence, the factual findings of the trial court are deemed to be conclusive. *See Commonwealth v. Whitmore*, 92 S.W.3d 76 (Ky. 2002); *Stewart v. Commonwealth*, 44 S.W.3d 376 (Ky.App. 2000); *Davis v. Commonwealth*, 795 S.W.2d 942 (Ky. 1990). Additionally, in making our determination as to the

substantial nature of the evidence, we must look to the totality of the circumstances presented. *Taylor v. Commonwealth*, 987 S.W.2d 302, 305 (Ky. 1998).

In reviewing the record, it is apparent that Justice had some information that Hamilton may have been involved in drug trafficking. On this particular occasion, with the questionable information given by Sloan concerning a "car deal," the officers would have reason to believe that a drug transaction had recently taken place. Moreover, when the officers arrived at Hamilton's residence, Beverly's erratic behavior in conjunction with the voluntary statements made by Hamilton regarding a potential outstanding warrant gave reason to the police to suspect she could be concealing or destroying evidence or worse taking actions that could bring the officers' safety into question.

The protective sweep concept has been acknowledged in several Kentucky and Sixth Circuit cases. *See, e.g., U.S. v. Colbert*, 76 F.3d 773 (6th Cir. 1996); *U.S. v. Johnson*, 9 F.3d 506, 510 (6th Cir. 1993); *U.S. v. Rigsby*, 943 F.2d 631 (6th Cir. 1991); *Davis v. Commonwealth*, 120 S.W.3d 185 (Ky.App. 2003). Furthermore, it was reasonable for Justice to believe that Beverly had common authority over the residence and therefore had the capacity to consent to search given that she was present at the time of police contact, was familiar enough with the interior to find a closet in which to hide, volunteered to show where the drugs and money would be located, and was Hamilton's live-in girlfriend. *See, e.g., Commonwealth v. Nourse*, 177 S.W.3d 691 (Ky. 2005), *citing U.S. v. Matlock*, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

Hamilton's reliance on *Southers v. Commonwealth*, 210 S.W.3d 173 (Ky.App. 2006) and *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d

208 (2006), is not well taken since they are distinguishable on their facts. First, the *Randolph* holding states that "a physically present co-occupant's *stated refusal* to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." *Randolph*, 547 U.S. at 106 (emphasis added). There is no evidence in the record of this case, however, that Hamilton expressly refused to permit a search of the residence. Absent such a showing, Beverly's consent is valid.

Furthermore, in *Southers*, the police only saw someone in a hotel room run into the bathroom after someone said the police were there. They were searching for a man they knew not to be in that room. The police in *Southers* simply lacked the exigent circumstances in light of the totality of the circumstances. On the other hand, Justice had general as well as specific information that brought him to Hamilton's particular residence. Additionally, Beverly's behavior combined with Hamilton's own comments provided additional exigent circumstances, thereby distinguishing this case from *Southers*. Therefore, we find there to be substantial evidence in light of the totality of the circumstances to support the finding of the court. Thus, we do not find clear error.

Accordingly, we affirm the holding of the Pike Circuit Court.

KELLER, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

STUMBO, JUDGE, DISSENTING: I respectfully dissent from the majority opinion because I believe there were no exigent circumstances present to justify the warrantless entry.

An appellate court's standard of review for a decision on a motion to suppress requires a determination of whether the trial court's findings of fact are

supported by substantial evidence. *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002). If they are, then they are conclusive. However, "[b]ased on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Id*.

"It is fundamental that all searches without a warrant are unreasonable unless it can be shown that they come within one of the exceptions to the rule[,]" and the Commonwealth bears the burden of proving that the warrantless entry falls within a recognized exception. *Cook v. Commonwealth*, 826 S.W.2d 329, 331 (Ky. 1992). Such exceptions include exigent circumstances, consent, or evidence in plain view. *Hallum v. Commonwealth*, 219 S.W.3d 216, 221 (Ky.App. 2007). "When exigent circumstances are present, such as the threat of imminent injury or the imminent destruction of evidence, police are permitted to enter a home without a search warrant." *Id*. at 222.

In this case, the majority relies on the officers' knowledge of "some" information of possible drug trafficking by the Appellant and Ryan Sloan's response about a car deal to justify their "knock and talk." After reaching the residence, the officers cite Beverly's behavior in conjunction with Appellant's statement about a possible outstanding warrant for her, as constituting an exigent circumstance to enter the house and execute a protective sweep which resulted in Beverly consenting to a search of the house. This Court in *Southers v.Commonwealth*, 210 S.W.3d 173, 176 (Ky.App. 2006), held that officers who responded to a call of an intoxicated person disturbing the peace at a motel and entered a room after seeing an occupant run to the bathroom was not an exigent circumstance. The officer in that case asked the occupant who else was in the room, became suspicious when the person yelled inside "the police is here," then edged

her aside and further opened the door. After opening the door, he observed the other two occupants who were sitting on the bed with a baggie that contained syringes and orange caps.

In the case at bar, there is some discrepancy about what happened according to the officers who opened the door. Taking Officer Justice's account of Appellant answering the door, as the majority has, the situation is similar to the one in *Southers*. Appellant came to the door and officers observed Beverly moving around inside just as the officer in *Southers* observed an occupant move, or in their description, run to the bathroom. This Court held that observing an occupant run to the bathroom after being seen sitting on a bed with a baggie containing syringes and orange caps, was not an exigent circumstance permitting a warrantless entry. Here, no drugs or other items were observed as in *Southers*, only Beverly moving in the house which was not an exigent circumstance to permit the warrantless entry.

Further, the Kentucky Supreme Court in *Commonwealth v. McManus*, 107 S.W.3d 175, 177 (Ky. 2003), held that observing occupants running inside a house with items possibly related to marijuana cultivation after refusing to consent to a search was not an exigent circumstance. In that case, officers without a warrant asked to search a home because of information of possible marijuana cultivation but were refused. As the officers reached the public sidewalk, they observed the defendant and another man "running in a frenzied manner throughout the residence[,]" carrying items that were possibly related to the alleged cultivation. *Id*. at 176. This situation is even further from the facts of the previous case in which an exigent circumstance was not found. Beverly was only observed moving through the house. She was not observed carrying anything

related to the alleged drug trafficking that the officers were initially investigating nor is there testimony that the officers were in fear of their safety; therefore, providing no exigent circumstance in this situation.

Before law enforcement may invade the sanctity of the home, the burden is on the Commonwealth to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries. *Id*. at 178. The Commonwealth has not adequately demonstrated that exigent circumstances existed to overcome that presumption by merely showing a person was moving around in the house. Due to there being no exigent circumstances, the entry into the house was illegal. This also causes the consent to search to be invalid. Without the consent, the police officers would not have found any drugs. Since the Commonwealth has not met its burden, the trial court's denial of Appellant's motion to suppress should be reversed.

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